



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 128 OF 2019**

**JIRA SHERA TUGWA.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT ON RESENTENCING**

1. The Petitioner herein was charged in Mariakani SPMC Cr. No. 618 of 2014 with one count of attempted murder contrary to Section 220 (a) of the Penal Code which particulars were that on 7/10/2014 in Fungani Location, Kinango District within Kwale County he unlawfully attempted to cause the death of the complainant by cutting him with a panga. On the second count he is charged with attempted arson contrary to Section 333 (a) of the Penal Code. The particulars are that on 6/10/2014 at Fungani Village, Kinango District within Kwale County he attempted unlawfully to set fire on a dwelling house the property of the complainant. The Petitioner was found guilty in both of the charges and sentenced to serve 10 years and 7 years respectively with sentences to run concurrently. The Petitioner appealed to the High Court Mombasa in Criminal Case No. 145 of 2015 and the appeal was dismissed.

2. The Petitioner now purports to come to this Court for resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** which was to the effect that mandatory nature of a sentence is unconstitutional. The Petitioner also prays that the time he spent in remand being one year, be accounted as part of the sentence. And finally that he be placed on probation and serve his sentence from out of prison.

3. **M/S Wanjohi**, learned Counsel for the State objected to this petition on the basis that this Court lacks the jurisdiction to resentence the Petitioner since the matter does not fall within the ambits of Francis Karioko Muruatetu case.

4. I have considered the petition and rival submissions. In my view, and as correctly pointed out by **M/S Wanjohi**, this is not a matter where the principles outlined in Muruatetu case apply.

5. The prosecution submitted that the Petitioner was charged with the offences of attempted murder and attempted arson under Sections 220 and 333 of the Penal Code respectively. Under Section 220 any person found guilty of charge of attempted murder is liable to imprisonment for life, while under Section 333 any person found guilty of the offence of attempted arson is liable to imprisonment for fourteen years. The said sentences are not mandatory and the trial court has discretion to issue sentences taking in consideration the circumstances of the case and therefore, are not unconstitutional as per the **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. In **Abdalla Kirao Wanje v Director of Public Prosecution [2020] eKLR** it was held as follows:

**“I have noted that the Court of Appeal determined the issue as regards the legality of sentence. In terms of Section 220 of the Penal Code, attempted murder is a felony and the sentence prescribed is a maximum of life imprisonment. The Petitioner was sentenced to 15 years’ imprisonment which is not maximum term of imprisonment. Thus the trial court excised its discretion in passing the sentence. In the premises, the sentence imposed herein is not a mandatory sentence, hence it does not fall under the principle in Muruatetu.”**

6. The Petitioner’s case was properly decided. He lost the appeal and there is nothing further the law can do for him. His desire to be released on probation is also rejected because he has not laid a proper basis for the same. Neither has he shown why he should be released on probation. It is my view that the Petitioner actually received very lenient sentence and he should be content with that.

7. The Petitioner’s request that the period he spent in remand be accounted as part of his sentence is granted, provided that he provides satisfactory proof that he spent one year in remand. According to the record before the Court, the Petitioner committed the offence on 6/10/2014; and Judgment was delivered on 16/7/2015. The entire process took less than 9 months. Even then, the Petitioner has not placed any document before this Court that he was remanded for a period of 1 year or for any other period.

8. However, it is now the position in law that time spent in remand is accounted for in sentencing. The burden is upon the Petitioner to prove time he spent in remand.

9. For the foregoing reasons, the petition is dismissed for lack of merit.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF MARCH, 2021.**

**E. K. OGOLA**

**JUDGE**

**Judgment delivered via MS Teams in the presence of:**

**Petitioner in person**

**Ms. Wanjohi for DPP**

**Ms. Peris Court Assistant**